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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

Date: **DEC 26 2013**

Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a software development and solutions business. It seeks to permanently employ the beneficiary in the United States as a senior business analyst. The petitioner requests classification of the beneficiary as an alien worker pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an advanced degree professional.

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is November 30, 2012. *See* 8 C.F.R. § 204.5(d). The record of proceeding shows that the Form I-140 petition was filed on August 12, 2013. At Part 2 of the Form I-140, Petition Type, the petitioner checked the box at 1.d., indicating that the petitioner was requesting classification of the beneficiary as a member of the professions holding an advanced degree or an alien of exceptional ability.

The director determined that the ETA Form 9089 failed to demonstrate that the job requires a professional holding an advanced degree or the equivalent, or an alien of exceptional ability and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4). The director denied the petition accordingly.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The issue on appeal is whether the petitioner has established that the job requires a professional holding an advanced degree such that the beneficiary may be found qualified for classification as an advanced degree professional.

Since no representation has been made that the beneficiary has exceptional ability, consideration of this petition will be limited to the issue of whether the petitioner seeks the beneficiary's services in a position which requires a professional with an advanced degree.

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

- (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, or a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

Part H of the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's degree.
- H.4-B Major Field of Study: Business Admin/Engg/Comp Sci/Tech/Related
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months.

- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: 60 months
- H.10-B Job title of acceptable alternate occupation: Software/Business/Programmer Analyst or related.
- H.14. Specific skills or other requirements: Any suitable combination of education, experience is acceptable. Employer will accept a combination of degrees.

On appeal, counsel asserts that the petitioner, by stating at Section H-14 of the labor certification "Employer will accept a combination of degrees," intends to elaborate on Section H-4 and H-6(A) as well as reference Section H-4(B). Counsel asserts that the petitioner, in stating that a combination of degrees is acceptable, intends to express that any of the fields of study listed in Section H-4(B) are acceptable to qualify for a U.S. Bachelor's degree; and that such a degree combined with 60 months of qualified experience would qualify for an advanced degree as defined under 8 C.F.R. § 204.5(k)(2). Counsel also asserts that by including the explanation in Section H-14, the petitioner intends to elaborate on the totality of the information provided in all of Section H; with specific focus on Sections H-4, H-6, H-8, and H-9. Counsel asserts that the petitioner did not intend to accept any combination of degrees in lieu of, or as a substitute for, the minimum required U.S. bachelor's degree or foreign educational equivalent; and therefore, the qualifications of the immigrant classification sought on the Form I-140 is supported by the labor certification which requires a bachelor's degree plus 60 months experience.

Contrary to counsel's claims, the job offer portion of the ETA Form 9089 indicates that the minimum level of education required for the position is "a combination of degrees" as specified at Section H-14. It is the job requirements of the ETA Form 9089 which drive the proper category for which to seek classification. 8 C.F.R. § 204.5(k)(4). The beneficiary must then meet the requirements of the labor certification by the priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Accordingly, the job offer portion of the ETA Form 9089 does not require a professional holding an advanced degree or the equivalent. However, the petitioner requested classification as a member of the professions holding an advanced degree or an alien of exceptional ability on the Form I-140. Although counsel claims that there is no discrepancy between the Form I-140 and the labor certification in that the petitioner, by stating its acceptance of a combination of degrees, intended to elaborate on its bachelor's degree plus 60 months experience and foreign educational equivalent requirements, the petitioner did not state such intentions at box 14 of the labor certification. The petitioner indicated at Section H.4-B that the major fields of study were to include: business administration, engineering, computer science, technology, or related field. At Section H.8, the petitioner indicated by checking the box marked "No" that there was no alternate combination of education and experience that it would accept. The petitioner has not submitted recruitment materials to verify that it would only accept a Bachelor's degree in business administration, engineering, computer science, technology, or related field and 60 months of experience in the job offered or 60 months of experience in an alternative occupation, software, business, programmer analyst, or related occupation. Without documentary evidence to support the claim, the

assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to re-adjudicate a petition under a different visa classification in response to a petitioner's request to do so. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). The regulation permits the director to deny petitions when the evidence does not demonstrate eligibility. *See* 8 C.F.R. § 103.2(b)(8). In this matter, as the accompanying labor certification indicates that the job does not require an advanced degree professional, the director correctly denied the petition.

The language used in the labor certification indicates that the petitioner is willing to accept a combination of acquired degrees in lieu of, or as a substitute for, the minimum required U.S. Bachelor's degree (H4) or foreign educational equivalent (H9) identified on the labor certification. As the petition is based on a labor certification application that contains qualifying language indicating that the petitioner will accept a combination of degrees, the petition cannot be approved as a member of the professions holding an advance degree because the certified position does not meet the minimum requirements of the classification sought.

Even if the AAO were to accept counsel's claims, the petitioner chose to accept a combination of degrees as alternative criteria to the advance degree requirements as specified by the petitioner at Section H.14 of the labor certification.

Beyond the decision of the director, the petitioner must also establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to

"examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification. Even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements. *See Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 *7 (D. Or. Nov. 30, 2006).

In the instant case, the labor certification states that the offered position requires a bachelor's degree in business administration, engineering, computer science, technology, or related field and 60 months of experience as a senior business analyst or in an alternate occupation, software/business/programmer analyst, or related.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. The instant record contains two labor certifications filed by the petitioner on behalf of the beneficiary. In Part J, Line 21 of the labor certification, signed by the petitioner on October 14, 2006, the petitioner stated under penalty of perjury that the beneficiary did not gain any of his qualifying experience with the petitioner in a substantially comparable position. In contrast, the petitioner stated under penalty of perjury in the instant labor certification at Part J, Line 21 that the beneficiary did gain his qualifying experience with the petitioner in a substantially comparable position. In the instant labor certification the petitioner listed the beneficiary's job title as programmer analyst, and in the labor certification dated October 17, 2006, the petitioner listed the beneficiary's job title as senior programmer analyst. The beneficiary's start date of October 17, 2005 is the same on both labor certifications. The record does not contain independent, objective evidence resolving the inconsistency. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

On the section of the labor certification eliciting information of the beneficiary's work experience in the job offered, he represented the following:

- That he was employed by [REDACTED] as a programmer analyst from October 17, 2005 to the present. The beneficiary's job duties are included.
- That he was employed by [REDACTED] as a programmer analyst from April 13, 2005 to October 16, 2005. The beneficiary's job duties are included.
- That he was employed by [REDACTED] as a programmer/network specialist from April 26, 2004 to February 24, 2005.
- That he was employed by [REDACTED] as a computer systems engineer from May 1, 2002 to April 24, 2004.

The petitioner submitted the following employment letters:

- A letter dated July 15, 2013 from the petitioner's president who stated that the company employed the beneficiary as a programmer analyst since October 17, 2005. The declarant described the beneficiary's job duties. As noted below, the beneficiary described his job title as "software engineer" on the Form G-325A.
- A letter dated October 25, 2004 from [REDACTED] in which it is stated that the company employed the beneficiary as a programmer analyst from April 13, 2005 to October 14, 2005. The letter is signed by an "authorized signatory" and it describes the beneficiary's job duties. The title of the signatory and his/her relation to the beneficiary is not indicated in the letter. The employment dates are inconsistent with the employment dates listed on the October 14, 2006 labor certification.
- A letter dated June 10, 2005 from an "authorized signatory" of Reliance Infocomm who stated that the company employed the beneficiary from April 26, 2004 to February 24, 2005 in the network department/division. The title of the signatory and his/her relation to the beneficiary is not indicated in the letter. The signatory fails to identify the beneficiary's title and fails to specify the beneficiary's job duties.
- A letter dated April 24, 2004 from the chairman/CEO of [REDACTED] who stated that the company employed the beneficiary as a "network engineer" from May 2002 to April 2004. The declarant failed to specify the dates of the beneficiary's employment and failed to describe the beneficiary's job duties.¹

¹ Although the declarant listed the beneficiary's job title as network engineer, the beneficiary listed his job title as computer systems engineer on the labor certification.

The letters from [REDACTED] do not conform to the regulations in that the name, address and title of the signatory are missing; and therefore, may not be used to establish the beneficiary's qualifications. Similarly, the letters from [REDACTED] do not establish the beneficiary's qualifications because they do not list his duties while employed by each. The letter from the petitioner describing the beneficiary's duties as a programmer analyst from October 17, 2005 through the date of the letter, July 15, 2013, may not be utilized to establish the beneficiary's qualifications, as the petitioner stated on the Form 9089 at part J.21 that the beneficiary gained the qualifying experience with the petitioner in a position substantially comparable to the job opportunity requested. The record is not clear that the DOL reviewed the experience gained with the petitioner to certify the Form 9089. As it appears from the employer's response to question J.21 that the experience gained with the petitioner is substantially comparable to the duties in the proffered position, the experience gained with the petitioner may not be counted to establish the beneficiary's qualifications as of the priority date.²

The petitioner did not submit any additional evidence on appeal relating to the beneficiary's employment history.

The record of proceeding contains a Form G-325A, Biographic Information form that was signed by the beneficiary, under penalty of perjury, and dated June 28, 2007. In the applicant's employment history section of the Form G-325A the beneficiary stated the following:

- That he was employed by [REDACTED] as a "software engineer" from September 2005 to the present.
- That he was employed by [REDACTED] as a "software engineer" from October 2004 to September 2005.
- That he was employed by [REDACTED] as a "software engineer" from March 2004 to October 2004.

The information provided in the employment statements is contradictory and inconsistent with the petitioner's statements and the beneficiary's statements on the ETA Form 9089 and Form G-325A with respect to the beneficiary's job experience. The beneficiary listed on the Form G-325A that he was employed by [REDACTED] as a "software engineer;" however, neither the petitioner nor any of the authors of the employment letters identify the beneficiary as being employed by them as a "software engineer." The beneficiary did not list [REDACTED] as a former employer on the Form G-325A. The beneficiary indicated on the Form G-325A that he was employed by [REDACTED] from October 2004 to September 2005; however, the representative of [REDACTED] stated in the employment letter that the company employed the beneficiary from April 13, 2005 to October 14, 2005. In addition,

² See 20 C.F.R. § 656.17.

the beneficiary indicated on the labor certification dated October 17, 2006 that he was employed by Ace Technologies from March 1, 2005 to October 16, 2005. The beneficiary indicated on the Form G-325A that he was employed by Reliance Infocomm from March 2004 to October 2004; however, the employment letter submitted by the company states that it employed the beneficiary from April 26, 2004 to February 24, 2005. The record does not contain independent, objective evidence resolving the inconsistencies and contradictions. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho* at 582.

For the reasons noted above, the petitioner failed to establish that the beneficiary possessed the minimum requirements of the offered position set forth on the labor certification by the priority date or that he is qualified to perform the duties of the proffered position. 8 C.F.R. § 204.5(g)(1). Accordingly, the petition must also be denied for this additional reason.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.